In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 539

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, INDIANA HARBOR BELT RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. A) dismissing appellants' action to set aside an order of the Interstate Commerce Commission in its Investigation and

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Suspension Docket No. 7980, Cancellation of Private Car Allowances on B & O CT and IHB (J.S. App. B, 322 I.C.C. 1[illegible]). Appellants are two Chicago terminal companies, Baltimore and Ohio Chicago Terminal Railroad Company (Chicago Terminal) and the Indiana Harbor Belt Railroad Company (Harbor Belt)—and three line-haul or road-haul rail carriers whose tracks connect with the Chicago switching district and who control the two terminal carriers—the Baltimore and Ohio Railroad Company, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the New York Central Railroad Company (the parent companies) (J.S. App. 2, 7). Ten connecting rail lines which compete with the three appellant road-haul carriers in transporting goods to and from the Chicago switching district and the American Refrigerator Transit Company intervened below in support of the Commission's order (J.S. App. 4–5).

The present controversy arose in 1963 when Chicago Terminal and the Harbor Belt unilaterally cancelled tariff provisions authorizing the payment of certain mileage allowances to the owners of railroad cars [illegible] their lines through the Chicago switching district (J.S. App. 11–12). Mileage allowances are [illegible] by railroads for the use of railroad cars owned by shippers or leasing companies. Payments are based on stated amounts per mile of travel, and are [illegible] which the railroads pay to owners [illegible] of equipment as [illegible] (J.S. App. 14, n. 2). [illegible] *Co.*, 296 U.S. 422,

429-430. All parties in this action concede that shippers are entitled to be compensated for the railroads' use of private cars (J.S. App. 7).

Simultaneous with the terminal carriers' proposed cancellations, the three parent companies proposed to pay the mileage allowances in place of their subsidiary terminal carriers on any movements on which they handled the line-haul (J.S. App. 2-3, 12). At that time, the three roads carried approximately 37% of the cars for which the terminals had previously paid the allowances. Since much of the traffic to and from the Chicago switching district could be routed over the roads of the three parent companies, most of the competing railroads immediately filed temporary "protective" tariffs.[1] However, the line-haul carriers have indicated that the "protective" tariffs would be withdrawn if the three parent companies of the Chicago Terminal and the Harbor Belt discontinued their payments, and have refused to agree to accepting this obligation on a permanent basis (J.S. App. 7, 12, 13).

The only appellant to offer evidence before the Commission was the Harbor Belt (J.S. App. 7, 12-13). After full administrative hearings, the Commission determined that appellants' proposed tariff sched-

[1] Appellants voluntarily postponed implementation of their amended tariff schedules until February 14, 1964 (J.S. App. 12). The tariffs of the competing railroads became effective on February 17, 1964, and were to continue during the pendency of the Commission proceedings (J.S. App. 3, 12).

One railroad, the Elgin, Joliet, & Eastern Railroad, a small carrier in the Chicago district, filed no "protective" tariff, and shippers have received no mileage car allowances for shipments on that line (J.S. App. 6).

that would have the effect of denying payment of mileage allowances to shippers for cars they provided on runs over the Harbor Belt and Chicago Terminal lines except when the connecting line was one of the parent carriers or the movement was for switching within or between the terminals (J.S. App. 19-20). The Commission found no indication that other line-haul carriers would permanently assume these payments (J.S. App. 15, 20). It further found that Harbor Belt's principal justification for the proposal—that payments of mileage allowances were responsible for the carrier's recent deficits—was not supported by the record because the claimed deficits were attributable not to mileage allowances but to Harbor Belt's entire operation (J.S. App. 19). Consequently, the Commission concluded that the proposed tariff schedules were not just and reasonable and, thus, a practice forbidden by Section 1(6) of the Interstate Commerce Act, 49 U.S.C. 1(6)[1] (J.S. App. 21).

On action to set aside the Commissioner's order, the three-judge court below, by *per curiam* opinion, sustained the Commission's findings and concluded that appellants had failed to satisfy their evidentiary burden under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), to justify their proposed tariff schedules as just and reasonable (J.S. App. 7-9).

[1] Section 1(6) is set forth as Appendix C to appellants' jurisdictional statement (J.S. App. 33).

ARGUMENT

The appeal presents no substantial question warranting plenary consideration by this Court.

There is no merit to appellants' contention that this case involves simply a dispute between carriers which is not within the Commission's jurisdiction under Section 1(6) (J.S. 6). *Baltimore & Ohio R. Co. v. United States*, 277 U.S. 291, 299-300. The Commission found that appellants' effort to shift payment of mileage car allowances to line-haul railroads would have the effect of reducing compensation to shippers for the use of rail cars they provided (J.S. App. 21). There is no dispute over the shippers' right to receive such payments (J.S. App. 5). The shippers' interest in receiving prompt payment, as the district court observed, makes this dispute one involving the purse of the shippers rather than merely a dispute between railroads (J.S. App. 6). See *Northern Pac. Ry. Co. v. United States*, 41 F. Supp. 439, 443 (D. Minn.). Thus, the Commission appropriately applied Section 1(6) to the circumstances of this case.

The evidentiary record affords no basis for undermining the Commission's conclusions. Only one of the five plaintiffs below, Harbor Belt, presented evidence to support the proposed tariffs; this evidence failed to support Harbor Belt's assertion that the changes were justified because it had sustained losses during ance. The Commission found that the carrier's total operations caused the deficits (J.S. App. 13–19). The Commission was also correct in rejecting Harbor Belt's other claim that Chicago terminal carriers should not be required to continue to make mileage allowance pay-

ments to shippers since line-haul carriers in other regions have taken over this duty from the terminal carriers (J.S. App. 20-21). Although the record indicates that line-haul carriers in Kansas City, St. Louis, Peoria, and Cincinnati have voluntarily contracted to assume this burden (J.S. App. 2, 8, 15), this is irrelevant to the circumstance in Chicago, where the line-haul carriers have declined to assume this burden on a permanent basis (J.S. App. 8, 15). Appellants' unilateral proposal to end these payments would substitute the speculation that competitive pressures on unwilling line-haul carriers would force them to pay the shippers mileage allowances for the certainty of payment to shippers as heretofore made by the terminal carriers. Thus, the Commission was justified in refusing to allow the terminal carriers to cease paying mileage allowances.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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